

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 19, 2006

ARTHUR L. ARMSTRONG v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. C2854 J. Randall Wyatt, Judge

No. M2005-01325-CCA-R3-CD - Filed June 8, 2006

The Petitioner, Arthur L. Armstrong, filed a petition for writ of error coram nobis alleging newly discovered evidence in the context of a Brady v. Maryland, 373 U.S. 83 (1963), violation and, alternatively, that counsel was ineffective by failing to use the evidence for impeachment purposes. The trial court summarily denied relief on the basis that the petition was time-barred. We conclude that, with respect to the Petitioner's claim of newly discovered evidence, an evidentiary hearing is required. As to the allegation of ineffective assistance of counsel, this issue is not appropriately addressed in a petition for writ of error coram nobis and, insofar as the pleading may be considered a petition for post-conviction relief, the trial court properly dismissed the claim without a hearing. Thus, we affirm the summary dismissal of the ineffective assistance claim. The judgment is affirmed in part, reversed in part, and remanded.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed in Part;
Reversed in Part; Remanded**

DAVID H. WELLES, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and JOHN EVERETT WILLIAMS, JJ., joined.

Arthur L. Armstrong, Only, Tennessee, Pro Se.

Paul G. Summers, Attorney General and Reporter; David E. Coenen, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Lisa Naylor, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

This case presents a protracted procedural history. The facts underlying the convictions at issue in this case were summarized by this Court on direct appeal as follows:

[T]he victim was accosted by the [Petitioner] and Ronny Harris at about 11:00 o'clock on February 11, 1977, as she was getting out of her father's automobile which she had just parked at Fisk University in Nashville. At gunpoint, they took her to a room where the [Petitioner] raped her and Harris forced her to perform an oral sex act upon him, ejaculating in her mouth and forcing her at gunpoint to swallow the semen. Harris also raped her at this location.

They then took her to a large house where Harris left her with the [Petitioner] for a time. Pointing the pistol at her and threatening to kill her, the [Petitioner] forced her to perform oral sex on him, submit to anal intercourse two times and submit to normal sexual intercourse two times. While they were there, the [Petitioner] forced the victim to give him the .14 K [sic] gold star necklace which she was wearing.

The victim was then forced to go to an apartment complex where Earline Harris House resided with the defendant, Ronny Harris. Ms. House was the sister of Ronny Harris and the girlfriend of the [Petitioner]. The victim stated that she did not ask this woman for help because she was convinced that the woman already knew of the crimes being committed against her.

At gunpoint, Harris and the [Petitioner] took the victim's watch and rings, her father's tennis racket and other items of personal property worth approximately \$3,000.00.

The victim was not released until the following morning. After being released, the victim reported the outrage to the police. She selected the [Petitioner's] photograph from one stack and Ronny Harris's photograph from another stack. After identifying a photograph of the [Petitioner], she noted that he was wearing the gold star necklace which he had taken from her at the large house. She identified other photographs of the [Petitioner] and made a positive identification of him at trial. Though her eyes were taped a part of the time, she had limited vision because the tape became partly unstuck.

The victim's 14 k. [sic] gold star necklace and her father's tennis racket were recovered by police from the [Petitioner's] apartment. Other items of property taken from her were recovered from the apartment which Harris shared with Earline House. The victim testified that the abductor she identified as the [Petitioner] told her to call him "Nate." The [Petitioner] owned a T-shirt with the word "Nat" on it and it was established that this was one of his nicknames.

Arthur L. Armstrong v. State, No. C-2854, slip op. at 1-3 (Tenn. Crim. App., Nashville, Feb. 27, 1980).

On November 3, 1978, a Davidson County jury convicted the Petitioner of armed robbery, rape, kidnapping, and two counts of crime against nature. For these convictions, he received two life sentences for the rape and kidnapping, twenty years for the armed robbery, and two indeterminate terms of not less than ten years nor more than fifteen years for the crimes against nature. Id. at 1. All sentences were to be served consecutively. Id.

This Court affirmed the Petitioner's convictions and sentences on direct appeal. See id. at 7. In evaluating the sufficiency of the evidence to support the Petitioner's convictions, the court reasoned:

The [Petitioner] did not testify in his own behalf and his principal defense was that of identification. Among other things, he insists that the victim's identification evidence was invalidated by her failure to mention his two gold front teeth. This, and the other discrepancies alleged by the [Petitioner], went to the weight of the evidence for consideration of the jury along with all of the other proof in the case. After reviewing this voluminous record, we find overwhelming and convincing evidence upon which a rational trier of fact could be convinced beyond a reasonable doubt of the [Petitioner's] guilt.

Id. at 3-4. No permission to appeal was filed.

Nine years later, on October 18, 1989, the Petitioner filed a petition seeking post-conviction relief raising four allegations of ineffective assistance of counsel. The trial court denied relief. On appeal, the Petitioner argued that his trial counsel was ineffective for failing "to file pretrial motions to suppress the photographic show-up." Arthur Armstrong v. State, No. 01C019003CC00069, 1990 WL 160915, at *1 (Tenn. Crim. App., Nashville, Oct. 25, 1990). This Court affirmed the denial of relief, finding that the "decision not to contest the photographic identification" was "a reasonable tactical decision." Id. Our supreme court denied his application for permission to appeal on January 22, 1991.

In June of 1992, the Petitioner filed for habeas corpus relief in the Federal District Court for the Middle District of Tennessee. The petition was dismissed without a hearing because the Petitioner "had failed to properly exhaust three out of his four claims for relief." Armstrong v. Morgan, 372 F.3d 778, 780 (6th Cir. 2004); see also Arthur L. Armstrong v. State, No. 01C01-9311-CR-0043, 1994 WL 695424, at *1 (Tenn. Crim. App., Nashville, Dec. 8, 1994).

On April 21, 1993, the Petitioner "filed a pro se petition for a state writ of habeas corpus and a delayed appeal to the Supreme Court." Armstrong, 1994 WL 695424, at *1. The trial court dismissed the habeas corpus petition, finding that "the issues raised by [the Petitioner] were not

grounds for habeas corpus relief, that if the petition were considered as one seeking post-conviction relief, it was time barred by the provisions of Tennessee Code Annotated Section 40-30-102, that the issues were either previously determined or waived, and that the trial court could not decide whether the Court of Criminal Appeals would hear a delayed appeal.” Id.

The Petitioner appealed the dismissal of his petition to this Court and, for the first time, he alleged a violation of Brady v. Maryland, 373 U.S. 83 (1963). Specifically, the Petitioner alleged:

[T]he police investigative file contains exculpatory evidence and that the prosecution withheld this material from defense counsel. [The Petitioner] further alleges that he was unaware of this exculpatory material until counsel discovered it shortly after the denial of his petition for a writ of habeas corpus. According to [the Petitioner’s] brief, the exculpatory material is found in a police report in which the investigating officer wrote: “The victim stated that she did not get a good look at her assailants, therefore, having her look at mug shots would be useless.”

Armstrong, 1994 WL 695424, at *3. This Court declined to address the Brady issue; however, we noted that, even though the statute of limitations had expired, the Petitioner could file a petition for post-conviction relief under the authority of Burford v. State, 845 S.W.2d 204 (Tenn. 1992). In so concluding, we stated:

[The Petitioner] alleges that the prosecution failed to disclose a police report that contained information relevant to the validity of his identification by the victim, and that the material was discovered only recently. On its face, it appears that this is precisely the scenario that the Supreme Court was considering when it forged the rule in Burford.

Armstrong, 1994 WL 695424, at * 3.

The Petitioner then “filed a pleading entitled ‘Amended Petition for Post-Conviction Relief’ asserting that the case had been remanded to the trial court.” Arthur L. Armstrong, No. 01C01-9608-CR-00331, 1997 WL 602939, at *1 (Tenn. Crim. App., Nashville, Sept. 30, 1997). Even though the Petitioner was mistaken about remand on the Brady issue, the trial court held an evidentiary hearing and dismissed the petition. Id. On appeal, this Court noted the following facts relevant to the issue:

The issue regarding Brady material involved two (2) police reports which Petitioner claimed were exculpatory and were not provided to him by the State. It is apparent from the record that Petitioner’s two attorneys at the original trial were both deceased by the time the present petition was heard in the trial court. However, an attorney in Nashville who formerly was an Assistant District Attorney in Davidson County and who prosecuted the Petitioner’s case testified at this most recent hearing.

He stated the reports were provided to defense counsel prior to trial. The trial court specifically accredited the testimony of the former prosecutor, and found that the police reports were indeed provided to Petitioner's attorneys prior to his trial in 1978.

At the evidentiary hearing, the Petitioner also alleged that his trial counsel was ineffective for not attacking the credibility of the victim, not appealing the apparent Brady violation, and not providing the police reports to the Petitioner. The trial court found that all of these issues were either previously raised in a prior post-conviction hearing, had no merit because no Brady violation was found, or failed to show prejudice to Petitioner by any alleged ineffective acts of his trial counsel.

Id. at *1-2. We then concluded that "the evidence does not preponderate against the finding of the trial court." Id. at *2. On April 13, 1998, permission to appeal was denied.

In March of 1999, the Petitioner again filed for habeas corpus relief in the Federal District Court for the Middle District of Tennessee. Armstrong, 372 F.3d at 780. In June 2002, the Petitioner sought leave to amend the petition, which was granted. Id. In the amended petition, the Petitioner argued that "the state court erred in concluding that no Brady violation occurred and that if the district court found that the exculpatory materials were presented to [the Petitioner's] original counsel, then his trial attorneys were constitutionally ineffective." Id. On September 30, 2002, the district court "granted summary judgment in favor of Warden Morgan concluding that [the Petitioner] had procedurally defaulted his ineffective assistance of counsel claim and that the state court's factual determination that [then Assistant District Attorney] Raybin disclosed the reports to [the Petitioner's] counsel was entitled to the statutory presumption of correctness." Id. at 780-81. The United States Court of Appeals for the Sixth Circuit affirmed, id. at 783, and the United States Supreme Court denied certiorari on November 8, 2004, Armstrong v. Morgan, 543 U.S. 982 (2004).

On March 10, 2005, the Petitioner, pro se, filed an "Application for a Writ of Error Coram Nobis." The Petitioner again claimed that the State failed to disclose Brady material, i.e., two medical documents. In the first document, Physical Examination Progress Notes, it is noted that the victim's "eyes were taped so she could not see the men." In the second document, the Emergency Room Record, it is stated that the victim's "eyes were taped, and she never saw them." (Emphasis in original).¹ The Petitioner submitted that defense counsel made a specific request for exculpatory evidence, and the State withheld the exculpatory medical documents in violation of Brady v. Maryland. The Petitioner further stated that the documents were subsequently discovered "while conducting investigation for appellate proceedings." As an alternative argument, the Petitioner contended that, if the documents were presented to his trial counsel, then trial counsel rendered ineffective assistance by failing to impeach the victim with the statements contained in the medical

¹ We are unable to discern whether these documents were created by the same individual because the signatures are illegible. Both documents were apparently made on the same day and at the Emergency Room of Metropolitan Nashville General Hospital.

documents. By order dated April 12, 2005, the trial court determined that the Petitioner failed to file his petition within the one-year statute of limitations and failed to demonstrate that due process required tolling of the statute of limitations. It is from this determination that the Petitioner now appeals.²

ANALYSIS

A writ of error coram nobis is available to a defendant in a criminal prosecution. Tennessee Code Annotated section 40-26-105 provides, in pertinent part:

The relief obtainable by this proceeding shall be confined to errors dehors the record and to matters that were not or could not have been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding. Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial. The issue shall be tried by the court without the intervention of a jury, and if the decision be in favor of the petitioner, the judgment complained of shall be set aside and the defendant shall be granted a new trial in that cause.

Tenn. Code Ann. § 40-26-105.

A writ of error coram nobis is an “extraordinary procedural remedy.” State v. Mixon, 983 S.W.2d 661, 672 (Tenn. 1999). As previously noted by our Court, “the purpose of this remedy ‘is to bring to the attention of the [trial] court some fact unknown to the court, which if known would have resulted in a different judgment.’” State v. Hart, 911 S.W.2d 371, 374 (Tenn. Crim. App. 1995) (quoting State ex rel. Carlson v. State, 407 S.W.2d 165, 167 (Tenn. 1996)). The decision to grant or to deny a petition for the writ of error coram nobis on the ground of subsequently or newly discovered evidence rests within the sound discretion of the trial court. Tenn. Code Ann. § 40-26-105; Teague v. State, 772 S.W.2d 915, 921 (Tenn. Crim. App. 1988), overruled on other grounds

²The Petitioner’s notice of appeal is dated May 11, 2005, but the criminal court clerk’s stamp on the notice of appeal indicates that the notice was filed on May 19, 2005, seven days late. Pursuant to Rule 4, Tennessee Rules of Appellate Procedure, a notice of appeal shall be filed within thirty days after entry of the judgment from which an appeal is sought. Moreover, Rule 20(g), Tennessee Rules of Appellate Procedure, governs pro se filings by incarcerated litigants. This rule provides that a filing will be considered timely if it is delivered to the appropriate individual at the correctional facility within the time fixed for filing. Although the pro se notice of appeal indicates that the Petitioner drafted it within the thirty-day requirement, it is not apparent when the Petitioner delivered it to the appropriate individual at the correctional facility. However, the notice is not jurisdictional. This Court may review untimely appeals and determine whether the notice requirement should be waived. Tenn. R. App. P. 4. Consequently, we will waive the timely filing of the notice of appeal in the interest of justice and address the issues on the merits.

by Owens v. State, 908 S.W.2d 923, 928 (Tenn. 1995); Jones v. State, 519 S.W.2d 398, 400 (Tenn. Crim. App. 1974).

To establish that he is entitled to a new trial, the Petitioner must show: (a) the grounds and the nature of the newly discovered evidence, (b) why the admissibility of the newly discovered evidence may have resulted in a different judgment if the evidence had been admitted at the previous trial, (c) that the Petitioner was without fault in failing to present the newly discovered evidence at the appropriate time, and (d) the relief sought. Hart, 911 S.W.2d at 374-75. Affidavits should be filed in support of the petition or at some point in time prior to the hearing. State v. Doyle Hart, No. 02C01-9612-CC-00451, 1997 WL 563613, at *6 (Tenn. Crim. App., Jackson, Sept 10, 1997) (citing Ross v. State, 170 S.W. 1026, 1027-28 (Tenn. 1914); State v. Todd, 631 S.W.2d 464, 466-67 (Tenn. Crim. App. 1981)).

The grounds for seeking a petition for writ of error coram nobis are not limited to specific categories, as are the grounds for reopening a post-conviction petition. Coram nobis claims may be based upon any “newly discovered evidence relating to matters litigated at the trial” so long as the petitioner also establishes that the petitioner was “without fault” in failing to present the evidence at the proper time. Coram nobis claims therefore are singularly fact-intensive. Unlike motions to reopen, coram nobis claims are not easily resolved on the face of the petition and often require a hearing.

Harris v. State, 102 S.W.3d 587, 592-93 (Tenn. 2003).

The statute of limitations for seeking a writ of error coram nobis is one year from the date the judgment becomes final in the trial court. Tenn. Code Ann. §§ 40-26-105, 27-7-103; Mixon, 983 S.W.2d at 671. In this case, the Petitioner was convicted by a jury in November of 1978. This Court affirmed the convictions on February 27, 1980. The parties do not dispute that the statute of limitations, if not tolled, expired many years before the filing of the instant petition.

In the instant case, the trial court summarily dismissed the petition finding that “the petition was filed outside of the one year statute of limitations, and there are no due process grounds that require the statute of limitations to be tolled.” The court also noted that “the Petition does not include the date when the Petitioner discovered the medical reports, nor does it explain why the claim was not brought in the Petitioner’s prior attempt to obtain a new trial based on Brady violations.” Citing Gregory A. Hedges v. State, No. E2002-02610-CCA-R3-PC, 2003 WL 22426831 (Tenn. Crim. App. Knoxville, Oct. 24, 2003), and Hershell Lee Kinnaird v. State, No. M2000-0037-CCA-R3-PC, 2001 WL 881371 (Tenn. Crim. App., Nashville, Aug. 7, 2001), the court further determined that “the alleged Brady violation does not constitute newly discovered evidence for which relief under the writ of error coram nobis is appropriate.”

I. Brady Violation

The Petitioner alleges that the State violated his constitutional rights under Brady v. Maryland by withholding the medical documents from him at trial. He further argues that this evidence is exculpatory because it casts doubt on the victim's identification of him as one of her attackers, the key issue at trial.

Under Brady v. Maryland, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." Brady, 373 U.S. at 87. Evidence which is favorable to an accused includes proof which may be used to impeach the prosecution's witnesses. State v. Copeland, 983 S.W.2d 703, 706 (Tenn. Crim. App. 1998) (citing Giglio v. United States, 405 U.S. 150 (1972)). However, "the evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985).

Thus, a criminal defendant must satisfy the following four prerequisites in order to demonstrate a due process violation under Brady v. Maryland:

1. The defendant must have requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not);
2. The State must have suppressed the information;
3. The information must have been favorable to the accused; and
4. The information must have been material.

State v. Edgin, 902 S.W.2d 387, 389 (Tenn. 1995). The defendant has the burden of proving a Brady violation by a preponderance of the evidence. Id. "The key to proving a constitutional violation is to show that the omission is of such significance as to deny the defendant the right to a fair trial." Id.

The Petitioner has demonstrated that the medical documents were both material and favorable to his defense. Thus, the State was required to disclose the statement under Brady v. Maryland. We are careful to note that, at this juncture, we are unable to determine whether the State suppressed this information. This initial determination is for the trial court upon remand following the presentation of evidence on the issue.

The State argues that the Petitioner's allegation of a Brady v. Maryland violation is not appropriately addressed in a coram nobis proceeding. Specifically, citing Kinnaird, 2001 WL 881371, at *5-6; Hedges v. State, 2003 WL 22426831, at *2; and State v. Hershell Kinnaird, No. 01-

C01-94-4-CC-00149, 1995 WL 382612, at *4 (Tenn. Crim. App., Nashville, June 28, 1995), the State argues that “a petition for writ of error coram nobis is not the appropriate remedy by which to seek relief from constitutional errors such as that asserted under Brady v. Maryland.”

In the recent opinion of Freshwater v. State, 160 S.W.3d 548 (Tenn. Crim. App. 2004), this Court addressed the State’s argument, and held that, in that case, a petition for a writ of error coram nobis was an appropriate remedy by which to seek relief from constitutional errors such as that asserted under Brady v. Maryland. In that case, the court reasoned:

Kinnaird was decided several months after the supreme court’s decision in Workman [v. State, 41 S.W.3d 100 (Tenn. 2001)], yet the Kinnaird opinion does not reference or cite Workman even though Workman dealt with a similar issue - a coram nobis proceeding predicated on evidence that was unavailable at the time of the defendant’s trial due to alleged suppression by the State. See Kinnaird, 2001 WL 881371, at *1-4. We feel this seriously calls into question the Kinnaird’s panel reliance on the earlier Kinnaird decision that determined Brady violations are not appropriate for coram nobis relief. See Kinnaird, 2001 WL 881371, at *6 (relying on Kinnaird, 1995 WL 382612, at *4, to conclude that allegations of Brady violations are not appropriate in a coram nobis proceeding).

In the case herein, the petitioner’s allegations of the newly discovered evidence in the context of violations of Brady v. Maryland, were not, and could not have been, litigated previously. Despite the petitioner’s discovery request for statements of Mr. Box prior to trial, the existence of the evidence was not discovered until September of 2002 when current counsel for the petitioner and one of the original prosecutors reviewed the District Attorney’s case file from the original trial. Further, at least one reported case from this Court, State v. Workman, 111 S.W.3d 10, 18 (Tenn. Crim. App. 2002), discusses coram nobis relief in the context of suppressed exculpatory evidence that also might amount to new evidence of innocence.

Freshwater, 160 S.W.3d at 555-56.

Accordingly, we conclude that, if the State withheld the evidence, the Petitioner’s “allegations of newly discovered evidence are appropriately addressed in a petition for writ of error coram nobis[.]” Id. at 556. Therefore, the next step is to determine whether the statute of limitations should be tolled in this case. Id. Again, Freshwater is instructional.

In Workman, the supreme court found that, in a variety of contexts, due process may require tolling of an applicable statute of limitations. Id. at 103. The Workman court relied, in part, on the due process considerations discussed in Burford v. State, 845 S.W.2d 204 (Tenn. 1992). Workman, 41 S.W.3d at 102.

Specifically, the Burford court recognized that “before a state may terminate a claim for failure to comply with procedural requirements such as statutes of limitations, due process requires that potential litigants be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner” and that, “under the circumstances of a particular case, application of the statute may not afford a reasonable opportunity to have the claimed issue heard and decided.” Id. (quoting Burford, 845 S.W.2d at 208).

In determining what sort of opportunity is “reasonable,” the court concluded that “identification of the precise dictates of due process requires consideration of both the governmental interests involved and the private interests affected by the official action. . . .” Workman, 41 S.W.3d at 102. In Burford, the private interest at stake was the accused’s opportunity to attack his conviction and incarceration on the grounds that he was deprived of a constitutional right via a post-conviction petition; the governmental interest represented by the statute of limitations was the prevention of stale and groundless claims. Id. The court in Burford determined, after weighing the competing interests in that case, that the accused’s interest in mounting a constitutional attack upon his conviction and incarceration outweighed the State’s interest in preventing the litigation of stale and groundless claims.

Using that same analysis, the court in Workman weighed the governmental interests involved against the private interests affected by the official action and decided that, if the procedural time bar was applied, Workman could have been put to death without receiving an opportunity to have the merits of his claim evaluated by a court of this state. Id. at 103. In other words, the court determined that due process precludes application of the statute of limitations to bar consideration of a petition for writ of error coram nobis in cases where the defendant’s interest in obtaining a hearing to present newly discovered evidence, which may establish actual innocence, far outweighs any governmental interest in preventing the litigation of stale claims. Id. The supreme court concluded that Workman was entitled to a hearing to evaluate the claims contained in his petition for writ of error coram nobis, notwithstanding the fact that he filed his petition thirteen months after discovering the newly discovered evidence. Id. In considering the delay, the court remarked that the time within which Workman’s petition was filed did not exceed the reasonable opportunity afforded by due process, especially in cases such as Workman’s where the evidence in issue may show actual innocence of a capital offense. Id. at 103-04.

Freshwater, 160 S.W.3d at 556-57.

The Petitioner’s case does not involve a capital offense as in Workman. However, consecutive sentences of life, twenty years, and two indeterminate terms of not less than ten years nor more than fifteen years is “in our opinion a sufficiently significant period of time to warrant

similar treatment for purposes of due process analysis.” Id. at 557. Moreover, “this Court has applied the doctrine set forth in Workman to non-capital cases.” Id. (citing State v. Ratliff, 71 S.W.3d 291, 296-97 (Tenn. Crim. App. 2001)).

If, as the petition alleges, the prosecution failed to disclose the medical documents containing the victim’s statements that she did not see her attackers and that the material was only recently discovered, due process would require tolling of any statutory time bar. These statements raise serious questions about whether or not she could identify her attackers, the key issue at trial. If the Petitioner’s allegations are found to be meritorious, we would conclude, as did this Court in the Petitioner’s habeas corpus appeal, that, “[o]n its face, it appears that this is precisely the scenario that the Supreme Court was considering when it forged the rule in Burford.” Armstrong, 1994 WL 695424, at *4.

In conjunction with this analysis of tolling the statute of limitations, the trial court must determine if the issue could have been previously litigated and if the Petitioner “was without fault” in failing to present the newly discovered evidence at the appropriate time, i.e., when did the Petitioner or when should he have discovered the documents. The State attempts to distinguish this case from Freshwater, arguing that this issue could have been litigated previously in the Petitioner’s prior post-conviction proceeding. “The [coram nobis] proceeding is confined to errors outside the record and to matters which were not and could not have been litigated at trial, the motion for new trial, appeal, or upon post-conviction petition.” Kenneth C. Stomm v. State, No. 03C01-9110-CR-00342, 1992 WL 97081, at *1 (Tenn. Crim. App., Knoxville, May 12, 1992); see also Tenn. Code Ann. § 40-26-105; Hart, 1997 WL 563613, at *6; State v. James D. “Sonny” Yarbrough, No. 01C01-9001-CC-00012, 1990 WL 109107, at *2 (Tenn. Crim. App., Nashville, Aug. 3, 1990) (noting that the remedy of error coram nobis is also not available on matters that were or could have been litigated in a post-conviction proceeding).

We are unable to determine from the record whether this issue could have been litigated previously. Therefore, we decline to distinguish this case from Freshwater on this ground. As we previously quoted, “coram nobis claims are not easily resolved on the face of the petition and often require a hearing.” Harris, 102 S.W.3d at 592-93. In his brief, the Petitioner states, “There was not a lack of diligence in pursuing these claims which [the Petitioner] inspected [sic] the State and police files.” He further provides, “Prior to discovery of this material, the Appellate Counsel had already filed a brief on [his] behalf before he was made aware of these reports. His Appellate Counsel has submitted a notarized statement to that effect.” In his reply brief, the Petitioner submits that, “prior to the appointment of Defense Counsel April, 2000, he never knew of the medical reports,” and he was unable to examine the documents until they were obtained by his investigator in 2001. This is a determination for the trial court at the hearing, and the Petitioner should have the opportunity to offer proof in this regard. Moreover, the Petitioner may desire to file an affidavit in support of the petition, as the notarized statement he refers to in his brief cannot be found in the record. See Hart, 1997 WL 563613, at *6 (citing Ross, 170 S.W. at 1027-28; Todd, 631 S.W.2d at 466-67).

If these issues are resolved in the Petitioner's favor,

the [P]etitioner will have the opportunity to establish that there is a "reasonable probability" that the newly discovered evidence may have resulted in a different judgment if the evidence had been admitted at the previous trial. See Tenn. Code Ann. § 40-26-105; Workman, 111 S.W.3d at 18.

Freshwater, 160 S.W.3d at 558. If the Petitioner makes this showing, he will be entitled to a new trial. Id. (citations omitted).

Additionally, we note that the trial court erred in dismissing the petition on the basis that it was time-barred because "the statute of limitations [applicable to writs of error coram nobis] is an affirmative defense which must be specifically plead or is deemed waived." Newsome v. State, 995 S.W.2d 129, 133 n.5 (Tenn. Crim. App. 1998). "Although coram nobis claims also are governed by a one-year statute of limitations, the State bears the burden of raising the bar of the statute of limitations as an affirmative defense." Harris, 102 S.W.3d at 593 (citing Sands v. State, 903 S.W.2d 297, 299 (Tenn. 1995)). The record before this Court contains no pleading filed by the State in response to the petition. The affirmative defense of the statute of limitations has, therefore, not yet been raised with respect to the Petitioner's claim for relief on the ground of error coram nobis.

II. Ineffective Assistance of Counsel Claim

The Petitioner argues alternatively that, if his trial counsel was aware of such medical documents, trial counsel was constitutionally ineffective for failing to impeach the victim with the statements contained in the documents. Ineffective assistance of counsel is not an appropriate ground for relief pursuant to a writ of error coram nobis. Domingo Ponce v. State, No. M2004-02257-CCA-R3-CO, 2005 WL 1303125, at *3 (Tenn. Crim. App., Nashville, May 31, 2005).

With respect to the availability of post-conviction relief, the post-conviction statute of limitations has likewise expired in this case. The State's failure to file a responsive pleading asserting the statute of limitations defense does not inure to the Petitioner's benefit in the context of a post-conviction proceeding. See State v. Nix, 40 S.W.3d 459, 464 (Tenn. 2001) (recognizing that, for petitions filed after May 10, 1995, the statute of limitations period is an element of the right to file a post-conviction petition and is not an affirmative defense that must be asserted by the State). Moreover, the Petitioner has alleged no grounds which would require that the limitations period be tolled for his ineffective assistance of counsel claim.

Finally, the Petitioner has previously filed two petitions for post-conviction relief which were resolved on the merits. See Armstrong, 1997 WL 602939; Armstrong, 1990 WL 160915. The 1995 Post-Conviction Procedure Act does not contemplate the filing of more than one petition for post-conviction relief, see Tennessee Code Annotated section 40-30-102(c), and the Petitioner has not satisfied the prerequisites to reopening his prior petitions, see Tennessee Code Annotated section 40-

30-117. Accordingly, insofar as the Petitioner's pleading may be considered as a petition for post-conviction relief, it was properly dismissed without a hearing.

CONCLUSION

In accordance with the foregoing, the Petitioner's claim that the State's violation of Brady v. Maryland led to newly discovered evidence is appropriately addressed in a coram nobis proceeding. Additionally, it is not determinable from the face of the petition whether a Brady violation in fact occurred, whether the statute of limitations should be tolled in this regard, if the issue could have been previously litigated, or if the Petitioner "was without fault" in failing to present the evidence at the appropriate time. The trial court's order summarily dismissing the portion of the writ of error coram nobis relating to newly discovered evidence is reversed, and the Petitioner is entitled to a hearing. We affirm the decision of the trial court dismissing the portion of the petition relating to ineffective assistance of counsel because the issue is not proper for relief pursuant to a writ of error coram nobis. This case is remanded for further proceedings consistent with this opinion.

DAVID H. WELLES, JUDGE